No. 94-0646

In The

Supreme Court of the United States

October Term, 1994

MARILYN RITTER, Bankruptcy Trustee, Substitute for TOMMY H. CONDREY,

Petitioner,

vs.

RICHARD K. HOWARD, JR., LEO A. MILLER, JR., HOWARD GIN, INC. and LOUISIANA FIBER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS RICHARD K. HOWARD, JR. AND LOUISIANA FIBER CORPORATION

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LIST OF PARTIES

1. Marilyn Ritter, bankruptcy trustee for the Estate of Tommy H. Condrey

2. Tommy Condrey

3. Richard K. Howard, Jr.

4. Howard Gin, Inc.

5. Louisiana Fiber Corporation

6. Leo A. Miller, Jr.

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Richard Howard, Jr. and Louisiana Fiber Corporation respectfully oppose the request of Marilyn Ritter for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, mindful of the admonition in Rule 15.3 that this brief shall be as short as possible.

Rule 10 provides that a Petition for a Writ of Certiorari will be granted only where there are special and important reasons therefor. The Rule provides criteria for granting certiorari to include conflict of the decision with that of another Court of Appeals on the same matter, when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, and when the questioned decision has decided an important question of federal law which is unsettled or decided in a way conflicts with decisions of this Honorable Court. The present controversy is not a case of special or important significance; it does not fit within the criteria just mentioned.

The questioned decision does not involve a substantive discussion of the applicable jurisprudence with regard to RICO. The decision, not deemed important enough to publish under the Rules of the Fifth Circuit, rests solely on questions of fact. As such, the decision does not reflect a conflict with the decision of another United States Court of Appeals on the same matter.

In like manner, the questioned opinion does not involve a state court decision. Furthermore, the decision does not conflict with the decisions of this Honorable Court and breaks no new ground on any important questions of unsettled federal law. In her reasons for requesting that the petition be granted, Marilyn Ritter, as Trustee for Tommy Condrey, has invited the Court to "revisit the 'pattern of racketeering activity' requirement for RICO liability, to reduce some of the conflict in the circuits, and to remind the courts that RICO is to be liberally interpreted . . ." (Brief of Petitioner, p. 10). The Court should decline this invitation; it lacks the substance needed for invocation of this Court's jurisdiction.

Even if a conflict in circuits existed on the issue of pattern of racketeering activity (which the respondents deny), the record in this matter is not so formed as to allow pronouncements of the type

rendered by this Court. Moreover, the opinion of the Fifth Circuit could not possibly create a confusing or contradictory jurisprudential impact — it is unpublished.

It is respectfully submitted that in considering this petition for a writ of certiorari this Court should consider what the Fifth Circuit did *not* do. The Court of Appeals for the Fifth Circuit did not hold, as implied by Item #1 of the "Questions Presented", that:

> ". . . the "relationship" for purposes of a "pattern of racketeering activity". . . could not be shown by wrongful acts which affect different victims." Brief of Petitioner, p. i.

The Fifth Circuit clearly held that the two (2) types of alleged dishonest dealings had different victims, different purposes, different results, *and* different methods of commission.

With regard to the second question presented in petitioner's brief, the Fifth Circuit did not hold that:

> ". . . "continuity" for purposes of a "pattern of racketeering activity" . . . could not be shown by predicate acts that involve two separate schemes and four different victims over a period of two and a half years." Brief of Petitioner, p. i.

The Court of Appeals held that Condrey has made no claim that the respondent's acts threaten long-term criminal activity. The court found that there was no proof — an evidentiary matter — that the acts established the entity's regular way of doing business. The court held that the acts regarding what has been dubbed the DRCP scheme occurred in 1986, that the Agway and Farmers Cottonseed claims occurred over two (2) separate years involving different

business arrangements with different customers in different capacities. The court found that the nature of the alleged schemes themselves showed not continuity but discontinuity. *See* page 14 of the opinion.[1]

The Court did hold that it was so obvious that Tommy Condrey did not prove a "pattern of racketeering activity" that it was not even necessary to discuss Condrey's "complex conceptual and factual difficulties" (Opinion A-2).[2]

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1. The opinion of the Court of Appeals is represented as Appendix A to the petition of Marilyn Ritter. The cited page of the opinion is represented as A-14. Future references to the opinion are made to the page of the appendix.

2. Such conceptual and factual difficulties include:

(1) The decision of the trial court appealed by Condrey had found that there was no factual basis to find that Howard Gin, Inc. was a member of the enterprise:

"It suffices to say that to hold Howard Gin, Inc. liable on the basis of the evidence in this case would result in a gross miscarriage of justice. This Court will not permit that to happen." Decision of the Honorable James T. Trimble entered December 3, 1992 at page 9 attached as an appendix to the brief of Howard Gin, Inc.

(2) "The record in this case is devoid of any evidence, direct or inferential, from which one could conclude that the two (2) individuals and the corporations mentioned in the interrogatory functioned as a single enterprise." *Id.* page 10.

(3) "The evidence in this case does not support the jury's finding as to the composition of the enterprise, nor will the evidence support any other compostition of an enterprise actionable under RICO." *Id.* pages 11 and 12.

In the first trial Richard Howard, Jr. was represented by counsel. No judgment was rendered against him, or against Howard Gin, Inc. for that matter. At the second trial Richard Howard, Jr. was unrepresented and the petitioner obtained a judgment against him with the jury apparently attributing his acts to Howard Gin, Inc., a corporation owned by his father. (Ruling on Post Trial Motion by Judge Trimble at page 20, attached as appendix to brief of Howard Gin, Inc.).

It would not serve this Court nor the interests of judicial economy to launch a line-by-line explanation or refutation of the facts alleged by Condrey in his brief or an itemization of those matters which have been omitted from the statement of facts. In six (6) typed pages of factual recitation only one (1) actual citation to the record has been made. Sweeping generalities and misstatement abound such as that contained at page 9 where Condrey states that he established at the trial that Richard Howard submitted fabricated tickets to Farmers Cottonseed. Judge Trimble held that the evidence did not establish which, if any, tickets were fabricated. (Trimble, p. 18). The Fifth Circuit pretermitted the matter. (Opinion A-11). *See also,* the statement at page 22 of his petition wherein Condrey states: "[t]he evidence was that Richard Howard cheated everyone that he and his companies did business with. . . ." The jury apparently accepted such sweeping arguments of Condrey's counsel against the unrepresented Howard but the Court of Appeals and the District Court were not so fooled.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH THIS COURT OR THE DECISIONS OF OTHER CIRCUITS ON THE ISSUE OF THE RELATIONSHIP OF PREDICATE ACTS FOR PURPOSES OF ESTABLISHING A PATTERN.

At his persuasive best, Condrey alleges at page 12 of his petition that Condrey proved that the predicate acts were committed by the same participants, against similar victims, for similar purposes with similar results and using similar methods. Once again, Condrey has used sweeping statements, devoid of factual basis. For example, with regard to his statement that the same participants were involved there is no question but that neither Howard Gin nor Leo Miller participated in each of the alleged predicate acts and Louisiana Fiber Corporation could not have participated in others. The statement regarding similar victims is incorrect on its face because Dixie River Cotton Products, Inc. was owned by Howard and Codrey; Agway was a purchaser of seed; and liability to Farmers Cottonseed arose by virtue of its status as owner of warehoused products stored by Louisiana Fiber as bailee. Condrey's allegations of similar purposes, results and methods are likewise defective upon close review. The relationship among the alleged wrongful acts bears no resemblance to the example provided by this Court in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 So. 2d 229, 198 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Nor does the relationship among the alleged wrongful acts fit within the tests provided by the other circuits as detailed in petitioner's brief.

II.

THE DECISION OF THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH PRECEDENT OF THIS COURT OR DECISIONS OF THE OTHER CIRCUITS REGARDING CONTINUITY.

A review of the Court's opinion indicates that it expressly followed the *H. J. Inc.* case and determined, as a matter of *fact*, that the three (3) predicate activities relating to DRCP and the Agway and Farmers Cottonseed transactions reflected not continuity but lack of continuity and, furthermore, that the conspicuous lack of success demonstrated beyond question that there existed no continuing threat.

CONCLUSION

Despite Condrey's arguments this case does not present a matter cognizable through writ of certiorari. In actuality this litigation represents little more than the inappropriate use of RICO as a weapon in a "commercial divorce" case. The district court appropriately granted the motion of Richard Howard and Louisiana Fiber Corporation for a judgment as a matter of law. The Court of Appeals affirmed without published opinion. This Court should decline to consider the matter further.

Respectfully submitted,

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